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## TABLE OF AUTHORITIES

# In the
# Supreme Court of the United States

October Term, 1976

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CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO,

*Petitioners*

*vs*

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Reid Burton Construction, Inc., the Respondent herein, respectfully requests that Petitioners' request for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit be denied.

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported at ____ F.2d ____ , 92 LRRM 2321, and appears in Appendix B hereto. The District Court Opinion is reported at ____ F.Supp. ____, 91 LRRM 2873, and appears in Appendix A hereto.

## JURISDICTION

The Court of Appeals' Judgment and Opinion was dated and entered of record on May 6, 1976, reversing in part the Judgment of the District Court and remanding the case to the District Court for further proceedings. The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

Labor-Management Relations Act, Section 301, 29 U.S.C. §185.

## QUESTION PRESENTED

Is it appropriate in some instances for a District Court to retain Section 301 jurisdiction of an arbitrable dispute, where the party claiming arbitrability is guilty of evasive and dilatory pleading tactics before the Court to such a degree that laches may apply to the claim?

## STATEMENT OF THE CASE

On July 13, 1974 Respondent Burton (hereafter called Burton) filed its Complaint against Carpenters District Council of Southern Colorado and its affiliated Local Union 1340 alleging that the Unions had violated the no-strike provisions of a collective bargaining agreement existing between the parties. (App. C at C-1). Paragraph five of the Complaint alleged that Carpenters District Council and Local 1340 were



"*parties*" to the subject collective bargaining agreement and that the agreement "*governed the relationship*" between Burton and the Unions. (App. C at C-1). On August 6, 1973 the Unions filed Motions to Dismiss. (R. pp. 8-9).[1] On August 20 the Unions filed a Brief in Support of the Motions to Dismiss and nowhere in that Brief was it argued that the Court lacked jurisdiction over the subject matter because the collective bargaining agreement required arbitration of the dispute. (R. pp. 10-56).

By Amended Complaint Burton deleted the request contained in the original Complaint for an injunction against the parties but otherwise the Amended Complaint continued to assert that the Unions were parties to a collective bargaining agreement that governed the relationship between them. (App. C at C-5).

Again, in response to the Amended Complaint, the Defendants filed further Briefs in Support of Motions to Dismiss and once again did not include as an issue the fact that the pleadings asserted a dispute which was otherwise arbitrable under the collective bargaining agreement. (R. pp. 80-110).

On November 9, 1973 an Answer to the Complaint was finally filed by the Unions which Answer stated that while the Carpenters District Council of Southern Colorado was a party to the agreement as alleged in the Complaint, Local 1340 was not a party to that agreement. (App. C at C-6). The Answer and Counterclaim filed simultaneously therewith asserted the existence of a grievance and arbitration procedure in the collective bargaining agreement, alleged that the Court action was barred by Burton's failure to exhaust contractual remedies and, by Counterclaim, asked to have the Court find that Burton violated the collective bargaining agreement by

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[1] References to the transcript of the trial shall be designated "Tr." with the numerical designation of the volume and transcript page immediately following. References to the Record on Appeal shall be designated "R." which shall mean Volume III of the Record on Appeal with the page designation immediately following.

not employing the grievance and arbitration procedure. [Id. at C-6-7]. Notably, such claim was made only on behalf of the District Council and not Local 1340.

However, nowhere in the pleadings did either Union ever ask the Court to order Burton's dispute to arbitration; at any point during these proceedings Local 1340 could have acknowledged it was bound by the collective bargaining agreement and expressed their willingness to arbitrate; it chose not to do so. A reply to the Counterclaim was filed by Burton on December 5, 1973 which, *inter alia*, alleged that the Defendants had waived any right, if any, they may have had to arbitration (R. pp. 140-143) and that the doctrine of laches would apply to the Counterclaim. (R. p. 141).

On March 11, 1974 the Carpenters District Council and Local 1340 filed an Amended Answer but did not amend their position that Local 1340 was not a party to the contract. (App. C at C-8). Thus, at each step, Local 1340 and Carpenters District Council passed up the opportunity to ask the Court for an order of arbitration and to express a willingness on their part to participate in arbitration. On March 11, 1974 the unions filed a Pre-Trial Statement where an "uncontroverted" fact was claimed by the Unions to be as follows:

> "5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement." [Id. at C-9-10].

Thus, the Unions passed up a fifth opportunity to admit being bound by the contract and to request arbitration of the dispute. On July 18, 1974 the Unions filed a "Suggestion to Dismiss" with the Court pursuant to *Federal Rules of Civil Procedure*, Rule 12(h)(3), asserting that the Court was without jurisdiction because Local 1340 now agreed it was "subject to the terms and provisions of the agreement" [Id. at C-11-12]. However, while continuing to ask for Court dismissal, at no time did the Unions ask that the matter be arbitrated or express a willingness to arbitrate! On July 23,



1974, five days after agreeing that Local 1340 was subject to the terms and provisions of the collective bargaining agreement, the Unions filed an Amended Pre-Trial Statement wherein they continued to allege that Local 1340 was not a party to the collective bargaining agreement:

> "The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff. . . . the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff." (R. p. 188).

On August 2, 1974 Burton filed a Reply to the Unions' Suggestion to Dismiss opposing the Motion and moving for assessment of costs and attorney's fees against the Unions for their dilatory and evasive pleading and procedural tactics. (R. pp. 209-220). Thereafter, and until the second day of trial, the Unions continued to assert that the Court was without jursidiction but failed to request that the matter be arbitrated and failed to express a willingness to arbitrate. Finally at trial on October 1, 1974 when pressed by the trial court Judge to state whether they were willing to arbitrate the dispute, the Unions finally answered in the affirmative. (Vol. I, Tr. p. 140). Burton opposed an order to arbitrate asserting that the devious and evasive dilatory tactics of the Unions before the United States District Court were so egregious as to constitute estoppel and laches to the request for arbitration. The Court proceeded to find that the Unions had flagrantly violated their collective bargaining agreement with Burton resulting in a loss to Burton of $10,801.97. (App. A at A-10). However, the Court felt reluctantly bound by the holding in *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972) and offered Burton the alternative of an order to arbitrate or a dismissal; Burton chose the latter and the matter progressed to the U.S. Court of Appeals for the Tenth Circuit. (App. A at A-14).

The Court of Appeals reversed the District Court's application of *Flair Builders* stating:

> ". . . We cannot agree with the district court's conclusion that in every instance where the parties

of a section 301 action are bound by a collective bargaining agreement *Flair Builders* requires questions of waiver, repudiation, estoppel, laches or other equitable defenses to be determined by an arbitrator. We deem this broad conclusion to be subject to an important limitation.

* * * *

". . . Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court. To hold otherwise could unnecessarily hamper a court's control of its proceedings.

* * * *

". . . However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct." (App. B at B-8, 9, 13).

## ARGUMENT – REASON FOR DENYING THE WRIT

### THE COURT OF APPEALS' DECISION IS BASED ONLY ON A LEGAL NOTION AS OLD AS THE LAW ITSELF AND REQUIRES NO REVIEW.

The Decision of the United States Court of Appeals for the Tenth Circuit simply holds herein, in summary, that a United States District Court, and the Judge sitting therein, has absolute authority to control the case before it and the Court can find the pleading or procedural tactics of a party relative to defenses raised at the eleventh hour to be so egregious as to create an estoppel and laches with respect to those defenses; only the District Court is empowered to make such a finding. It is a power that neither the Court nor parties to a



collective bargaining agreement may delegate to an arbitrator. The *Constitution of the United States*, Article III, Section 1 declares:

> "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish."

The power to punish for contempt is inherent in all courts, and Federal courts became possessed of the power the moment they were called to existence. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873). The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. *In re Debs*, 158 U.S. 564 (1895). A Federal court may not refuse to exercise its jurisdiction on comity considerations, except in special and peculiar circumstances. *Federal Deposit Insurance Corporation v. George-Howard*, 153 F.2d 591 (C.A. 8, 1946). Congress specifically gave jurisdiction to the United States District Court in actions concerning collective bargaining agreements by the provisions of the *National Labor Relations Act*, as amended, 29 U.S.C. §185. In essence, the Court of Appeals herein held that the inherent power of the courts, which flows from the jurisdiction granted them by Congress, includes the power to judge that the misbehavior of a party to a suit before the court can result in denying that party certain defenses raised in an untimely fashion. The Court of Appeals herein simply ordered that the U.S. District Court make a finding on whether or not the party's conduct in question here was of a degree sufficient to establish laches to the defense raised at the eleventh hour.

Assuming, *arguendo*, that the arbitration clause of the collective bargaining agreement which gave rise to the instant lawsuit was intended by the parties to be so broadly interpreted that it would cover "any dispute" between them, compare, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and *Drake Bakeries, Inc. v. Bakery Workers Local 50*,

370 U.S. 254 (1962), that consideration would not be applicable here. As the Court below so succinctly stated:

> ". . . but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function." (App. 8 at B-11).

The Petitioner herein predicates its plea to this Court on *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), and we submit that reliance on *Flair* is misplaced, as was found to be the case by the court below. *Flair* basically held that even issues that were extrinsic to the collective bargaining agreement, such as a party's waiver of contract time limits by pursuing a spurious court action, should be submitted to an arbitrator for a determination as to whether or not such conduct amounts to laches. However, the issue in the instant case is not over a matter that is either intrinsic or extrinsic to the collective bargaining agreement. Rather, here the matter before the Court is a matter that is intrinsic to the Court processes themselves while being extrinsic to the substantive legal nature of the lawsuit itself. If indeed *Flair Builders* were to be so narrowly viewed as Petitioner herein would prefer, the arbitrator to which the matter was referred would, as a threshold consideration, have to consider the question of whether or not the Unions' conduct before the United States District Court constituted laches to defenses raised before the United States District Court; if the arbitrator resolved that the Unions' conduct did create laches then he would "remand" the case back to the United States District Court for further proceedings!

In *Flair* the union filed complaint seeking damages for violation of a collective bargaining agreement. The employer



alleged that there was no enforceable agreement. The union then asked the court for an order requiring the employer to arbitrate. The employer responded by contending that if the alleged collective bargaining agreement required arbitration, the union was guilty of laches in not insisting on arbitration when the dispute first arose several years earlier because the contract required disputes to be submitted within 48 hours of their existence. Therefore, the obvious factor that distinguishes *Flair* from the case at bar is that the laches argument in *Flair* was nothing more than the employer's position that the union had not submitted the grievance in a timely manner *under the contract language*. Instantly, the nature of the laches defense asserted by Respondent Burton is entirely different. Here, Burton argued before the Court of Appeals that laches applied because of the Defendants' tactics in the U.S. District Court. Thus, unlike *Flair*, the laches asserted here by Burton does not go to the Unions' failure to enforce the arbitration provision of the contract itself in a timely manner, but rather strikes a protest against the Unions' unfair tactics in the U.S. District Court. The Court of Appeals below found Burton's argument to be sound and this Court is solicited, for the reasons above, not to disturb that finding.

## CONCLUSION

Respondent Burton respectfully requests this Court to deny the Petition for Writ of Certiorari as raising no question substantial enough to invoke this Court's consideration.

Respectfully submitted,

LAW OFFICES OF ROBERT G. GOOD

By _____
Robert G. Good

Attorney for Respondent

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Denver, Colorado 80202
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## CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 1976, three copies of the within Brief in Opposition to Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, were mailed, postage prepaid, to John W. McKendree, Esq., Law Offices of John W. McKendree, 1050 Seventeenth Street, Suite 2500, Denver, Colorado 80202.

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## APPENDIX A

### DISTRICT COURT MEMORANDUM OPINION AND AMENDMENT THERETO°

1. Memorandum Opinion (November 17, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5184

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Plaintiff

vs.

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations,

Defendants

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°The dates on which the District Court's Memorandum Opinion and Amendment thereto were filed with the clerk of the District Court are set forth in parentheses following the caption on the document. The party caption of the Order Amending Findings and Conclusions has been deleted for economy of space.

## MEMORANDUM OPINION

WINNER, Judge

By amended complaint brought under 29 U.S.C. §185, plaintiff sought damages against (a) Carpenters District Council of Southern Colorado, (b) Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO, and (c) Colorado Building and Construction Trades Council. The amended complaint alleged in material part:

> "5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as 'Carpenters' agreement, Carpenters District Council of Southern Colorado.' *At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.* [emphasis supplied].
> "6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado and (sic) they and their members will not strike or picket during the term of the agreement
> . . . .
> "7. . . . Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions."

By order of November 23, 1973, Colorado Building and Construction Trades Council was dismissed from the case under rules of contract and agency law, because, "Under the averments of the complaint here, and taking into account the actual parties to the contract, it can be said that Colorado



Building and Construction Trades Council is connected with this dispute only as an agent for a disclosed principal.

The other two defendants answered, and in paragraph 5 of the amended answer it is said:

> "5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. . . . . As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement."

July 10, 1974, the Local said that it *is* bound by the contract and that the dispute is subject to arbitration and that the case should be dismissed. Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendants' assertions that Local 1340 was not a party to the contract and should not have been taken aback by defendants' July 10, 1974, assertion that the non-party local was bound by a contract to which it is not a party, and this even though defendants had denied that they were governed by the agreement. I have said on the record and I repeat that sophistry such as this does not help a court in its futile efforts to keep up with an overcrowded docket.

Another pretrial conference was held after the suggestion to dismiss was filed, and the pretrial order contains the following partial statement of defendants' position as to the court's jurisdiction.

> "Although the Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that this Court does not have jurisdiction under Section

301 to reach the merits of the Plaintiff's claims for breach of contract, this Court does have threshold jurisdiction under Section 301 to determine whether the provisions of Article XII of the collective bargaining agreement provide for final and binding arbitration of the subject matter of Plaintiff's claim. Threshold jurisdiction for this determination lies under Section 301 because Plaintiff's claim involves an alleged violation of a contract between an employer and a labor organization. Furthermore the stance that the existence of applicable arbitration provisions deprives this Court of subject matter jurisdiction is not inconsistent with the stance that the Court has threshold jurisdiction under Section 301. Simply stated, the Court has jurisdiction to determine whether the Plaintiff's claims of breach of contract are substantively arbitrable, but once such claims are determined to be substantively arbitrable, the jurisdictional grant of authority under Section 301 ceases."

With this latest version of defendants' ever changing position being filed a scant week in advance of the trial date, the case proceeded to trial on all issues, the case was taken under advisement and post trial briefs were allowed. They have been filed, and, having been beleaguered by this case to the extent that I have, I shall make findings and conclusions on all questions directly or indirectly, and properly or improperly before me. I do this to avoid if possible any risk of having to try the case all over again if the Court of Appeals disagrees with my conclusions.

Plaintiff and Carpenters District Council of Southern Colorado are parties to a labor contract, and defendant Local 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO has now made a judicial admission that it is bound by that contract. Article XIII of the contract is the important article here. It provides in material part:

"ARTICLE XIII
"CONTRACTURAL DISPUTES

"Section 1 – In the event that a dispute arises involving the application or interpretation of the terms of this



agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative. If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and the aggrieved party shall notify the other party the dispute is being referred to a Board of Adjustment.

"Section 2 – The Board of Adjustment shall be composed of two representatives selected by the employer from contractors signatory to this agreement and two representatives selected by the union. The Board of Adjustment shall meet not later than five (5) days after a grievance has been presented to it.

"Should the Board of Adjustment be unable to render a majority decision after convening and hearing the dispute, the Board shall, within 48 hours, select an impartial chairman who is not directly connected with the building or construction industry, either as contractor or union. Should the parties be unable to agree on the selection of the chairman within said 48 hours, the same shall be selected from a panel of five (5) names submitted by the director of the Federal Mediation and Conciliation Service in Washington, D.C. The party initiating the dispute shall strike first on said list.

. . . . . .

"Section 3 – The majority decision of the Board of Adjustment shall be final and binding upon each party to the dispute in each instance and shall be within the scope and the terms of this agreement.

. . . . . .

"Section 5 – The parties agree there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment."

While the contract was in full force and effect, and while plaintiff was living up to all of its terms, Colorado Building and Construction Trades Council wrote a letter to plaintiff which said:

"Gentlemen:

"We are presently engaged in a program to standardize wages and working conditions in the construction industry in this area. To assist in accomplishing this, we are requesting builders and general contractors to subcontract jobsite work only to contractors who are parties to a contract with one of the unions affiliated with our council. A proposed draft of such agreement is enclosed for your consideration. You will note that it applies only to future work for which no sub-contract has been executed. Your signing of the proposed agreement would therefore not require you to terminate the services of any contractor for any job which is already under contract.

"We intend to acquaint the public, by means of picketing and other forms of communication, with the names of builders and general contractors who do not enter into our sub-contracting agreement. In the event that your company is the subject of such picketing, it will be conducted at your general offices and other places in which you may be engaged in business. The picketing will be directed to the public, and not to your contractors, suppliers, or employees. Its sole purpose will be to contest your right to the goodwill of the community. We wish to emphasize that we are not requesting or seeking, and do not desire, you to cease or refrain from doing business with any person, firm or corporation. Nor do we claim to represent, or seek or organize, any of your employees, and do not request or desire your recognition as their representative.

"If you have any comment or question concerning this matter, please communicate the same by letter, which will be referred to our Executive Board for appropriate



consideration and action. Neither the undersigned, nor any other person, has authority to discuss this matter in behalf of the union."

Plaintiff didn't go along with the request of the Building and Construction Trades Council, and, true to its word, pickets showed up at two of plaintiff's jobs in Fort Collins, Colorado, (a) the Everitt Office Building job, and (b) the Markley Motors job. Leaflets were handed out by the pickets, and these leaflets said:

"MESSAGE TO THE PUBLIC

"We are picketing REID BURTON because of his refusal to sign a sub-contracting agreement for future job site work. If you believe in the cause of fair wages and working conditions for American workers, please telephone or write to Reid Burton and request him to sign our subcontracting agreement for future job site work.

"Our picket is not directed against any other employer, and we have no dispute with any other employer on this project.

"Thank you!

"COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL

"The person giving you this leaflet is not authorized to discuss this or any other matter in behalf of the Colorado Building and Construction Trades Council."

Additionally, signs were posted which read:

"REID BURTON CONST. CO. Has No Contract With Colorado Building & Constr. Trades Council. We have no dispute with any other person or Co. on the project."

A responsible officer of the Local admitted to a representative of plaintiff that there was no claim by defendants of

a contract violation by plaintiff, and defendants made a tongue in cheek disavowal any intention of a strike. However, for the most part the carpenters didn't show up for work, and defendants say that their failure to work was not because of any strike, but, rather, the men's conduct was purely "voluntary" individual action. Defendants assert that they neither influenced, persuaded nor coerced the union carpenters not to work. The record belies defendants' pious contentions. Two of the union carpenters didn't "voluntarily" stay away from work. They made the mistake of voluntarily showing up for work. Retribution was swift. The business representative of Local 1340 filed charges against each of the carpenters who didn't "voluntarily" stay home. They were charged with, "Working behind a picket line duly authorized by a subordinate body of the United Brotherhood (Building and Construction Trades Picket) Working on Markley Motors Building, South College Avenue, Fort Collins, Colorado, 80521, on or about the 13th of March, 1973." To add insult to injury, although one of the carpenters lived in Longmont and the other in Ft. Collins, Colorado, their trial was held in Montrose, Colorado. As sure as death and taxes, they were convicted and fined, but as a result of later N.L.R.B. action, the fines were set aside. Although I have admitted to naivete in relying on the good faith of counsel, I am not so gullible as to accept defendants' protestations of innocence of violation of the no strike clause of the contract. Communications between all three named defendants were open at all times, and the entire episode was one of tripartite self help. The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same provision of the same contract which the local has now judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony, and the record made in this case permits a



finding, and I find that as a result of defendants' contract violations, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. Thus plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions.

Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes arbitration mandatory, and, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to an arbitrator for decision.

The scope and effect of the arbitration clause in question must be decided under Drake Bakeries v. Bakery Workers (1962) 370 U.S. 254, and Atkinson v. Sinclair Refining Co. (1962) 370 U.S. 238, opinions by Justice White handed down the same day. Atkinson held that only employee grievances were subject to arbitration, while Drake Bakeries held that all contract disputes had to be arbitrated. In Atkinson, Justice White explained:

> "In Drake Bakeries, Inc. v. Local 50, post, decided this day, the question of arbitrability of a damage claim for breach of a no strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate all complaints, disputes or grievances arising between them [i.e. the parties] involving . . . any act or conduct re relation between the parties."

Admittedly, Article XIII of the Carpenters' contract is not word for word with either Atkinson or Drake Bakeries, and plaintiff says that it is more comparable to Atkinson than it is to Drake Bakeries. Defendants, of course, take the opposite position. Without extended discussion, but after much thought, and after study of the many Supreme Court cases favoring arbitration, I must reluctantly agree with

defendants, and I hold that the dispute is encompassed within the mandatory arbitration provisions of the labor contract in question.

The question then arises as to whether defendants can insist on arbitration in light of their conduct leading up to and during this case. That is to say, are defendants prevented from insisting on arbitration under principles of waiver, repudiation, estoppel, laches or other equitable principles; and is this question to be decided by me or by an arbitrator? What I shall say presently will emphasize why I wholeheartedly agree with the views expressed by Justice Powell in International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, (1972) 406 U.S. 487, but Justice Powell was speaking in dissent joined in by the Chief Justice. I am bound by the majority view, and as I read Flair Builders, it is for the arbitrator to decide whether defendants can still insist on arbitration.

This conclusion presents the difficult question of whether I should dismiss this case or stay it pending arbitration. If I dismiss the case, plaintiff's appellate rights are certain, but if I stay it, plaintiff may have to go through an arbitration before it can appeal, and the Court of Appeals may hold that I am wrong in saying the disputes should be arbitrated. These factors argue in favor of dismissal.

On the other side of the coin, defendants have already made a 180 degree turn on the arbitrability question, and if I dismiss and plaintiff wants to arbitrate, defendants may make it a 360 degree turn. In this event, plaintiff would have to start all over again. Moreover, there is more than remote chance that the arbitrator will hold that under principles of waiver, repudiation, estoppel or laches, defendants cannot insist on arbitration. Should either of these eventialities come to pass, if the case has been dismissed, plaintiff would have to commence a new lawsuit. Indeed, if there be no limit to the rule of Flair Builders, a recalcitrant party can stall a dispute forever. These factors argue in favor of a stay.

My inclination is to order a stay of this case pending arbitration, but plaintiff is the one burdened with the



dilemma stemming from defendants' stalling. Accordingly, I shall and I do order that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard.

Dated at Denver, Colorado, this 19th day of November, 1974.

s/Fred M. Winner
United States District Judge

2. Order Amending Findings And Conclusions (December 27, 1974)

By memorandum opinion of November 19, 1974, I set forth my findings of fact and conclusions of law. They contain an inadvertent error on page 2. The following language should be stricken from page 2:

> "The other two defendants answered, and in paragraph 5 of the amended answer it is said:
>
> > '5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement.... As a consequence, both Defendant Carpenter District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.' "

The following should be substituted therefor:

"Plaintiff's complaints (both the original and amended complaint) pleaded that plaintiff and defendants,

Carpenters District Council of Southern Colorado and Local 1340 were parties to the collective bargaining agreement. Both the original answer and the amended answer filed by Carpenters District Council of Southern Colorado and Local 1340 denied that Local 1340 was a party to the contract. Defendants did not admit in the pleadings that Local 1340 was subject to the agreement and they did not admit that both defendants would be bound by an arbitrator's decision."

The quotation contained in the original opinion was from defendants' brief submitted with the "Suggestion to Dismiss," and the memorandum opinion erroneously says that the quotation was from paragraph 5 of the amended answer.

On page 10 of the memorandum opinion, I ordered:

". . . that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard."

Plaintiff has asked that I do amend the findings and conclusions to order a dismissal of the action rather than a stay. I grant this request, and for the reasons set forth in the memorandum opinion of November 19, 1974,

IT IS ORDERED that judgment enter in favor of defendants and against the plaintiff, and that the action be dismissed.

Dated at Denver, Colorado, this 27th day of December, 1974.

s/Fred W. Winner
United States District Judge



## APPENDIX B

### TENTH CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| REID BURTON CONSTRUCTION, INC., a Colorado corporation, | ) | |
| Plaintiff-Appellant, | ) | |
| v. | ) | No. 75-1149 |
| CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, | ) | (C-5184) |
| Defendants-Appellees. | ) | |

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Robert G. Good, Denver, Colorado, for Appellant.
John W. McKendree, Denver, Colorado, for Appellees.

Before LEWIS, Chief Judge; SETH and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Two clearly drawn but different issues are involved in this appeal: (1) Whether Reid Burton Construction's claim for damages arising out of the unions' alleged violation of the no-strike clause was arbitrable, and if so, (2) whether the unions, because of certain pleading and procedural tactics employed by them in the district court, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of Burton Construction's complaint. Finding both of these issues arbitrable, the district court dismissed the present action.

Since this appeal is not concerned with the merits of the underlying damage claim, we need only outline those facts which led to the filing of this action. Burton Construction, a signatory to a collective bargaining agreement with the Carpenters District Council of Southern Colorado and its affiliated local unions of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was approached by the Colorado Building and Construction Trades Council to sign an agreement whereby it would only subcontract with other employers who were in contractual relationship to labor organizations affiliated with the Building Trades Council. Burton Construction refused to sign the agreement and the Building Trades Council picketed several of Burton Construction's building sites during parts of March and April of 1973.

In spite of a no-strike clause in the collective bargaining agreement, union carpenters refused to cross the picket lines. As a result, on July 13, 1973, Burton Construction filed this damage claim in district court against the Colorado Building and Construction Trades Council, the Carpenters District Council of Southern Colorado, and Local 1340 of the United Brotherhood of Carpenters and Joiners. All three of the defendants made motions to be dismissed from the lawsuit. The court did dismiss the Building Trades Council, but denied the similar motions of the District Council and Local 1340.

In their answers filed on November 9, 1973, the District Council and Local 1340 admitted jurisdiction under section 301 of the National Labor Relations Act as to the District Council, but asserted that "Local 1340 is not a party to the



aforementioned collective bargaining agreement." Also in their answer, as an affirmative defense the District Council and Local 1340 alleged:

> This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement . . . which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof.

The unions also counterclaimed against Burton Construction, alleging that it had breached the collective bargaining agreement by filing this action for failure to have first used the grievance and arbitration procedures contained in the agreement for processing disputes. In Burton Construction's answer to the counterclaim, it contended that the unions had waived their right to arbitration and that the counterclaim was barred because of laches.

More than a year after the complaint was filed, the unions admitted that while they did not consider Local 1340 to be a "party" to the collective bargaining agreement, they did consider it to be "bound by the substantive terms of the agreement." The case proceeded to a trial on October 1, 1974, wherein the trial court determined that both the alleged violation of the no-strike clause and the issue of whether estoppel, waiver, repudiation, or laches should prevent the unions from demanding arbitration were arbitrable issues. The trial court based the latter determination on its reading of Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. The trial court initially intended to order a stay pending the arbitration of these two issues, but noted that if Burton Construction would prefer, the court would dismiss the action in order to perfect the appellate record. Burton Construction opted for the latter and this appeal followed.

I.

The first issue of whether Burton Construction's damage claim for alleged breach of a no-strike clause was an arbitrable

issue must be decided by a careful analysis of Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, and Atkinson v. Sinclair Refining Co., 370 U.S. 238. Both of these cases, which were decided the same day, were damage actions brought by employers against the unions for violations of no-strike or work stoppage provisions in the respective collective bargaining agreements. In each case the unions argued that the issues were arbitrable and that the courts should stay the actions pending arbitration. Basing its opinion on the intended scope and effect of each collective bargaining agreement, the Court reached different results.

The fact that the Supreme Court reached different conclusions in Atkinson and Drake Bakeries is consistent with its earlier observation in Warrier & Gulf Navigation where it stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582. Our first question therefore is one of contractual interpretation—whether a violation of the no-strike clause was intended by Burton Construction and the Unions to be subject to Article XIII, the grievance and arbitration provisions of the collective bargaining agreement.

Neither Drake Bakeries nor Atkinson definitively answers our question, since the language of Article XIII falls somewhere in between the pertinent grievance and arbitration provisions in those cases. In Atkinson, the Court found it persuasive that the grievance and arbitration clause applied only to employee-initiated grievances and was not intended to include "all of their possible disputes."[1] The applicable grievance provision in Drake Bakeries, however, was much

[1]The procedure for filing a grievance under the collective bargaining agreement in Atkinson clearly applied only to the employee- and/or union-initiated grievances:

> It is the sincere desire of both parties that *employee grievances* be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:
>
> 2. For the purpose of adjusting *employee grievances and disputes* as defined above, it is agreed that *any employee, individually or accompanied by his committeeman,* if desired shall:
>
> (a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed...
>
> (b) If the question is not then settled the employee may submit his grievance in writing, on forms supplied by Union...

*Quoted in* Atkinson v. Sinclair Refining Co., 370 U.S. 238, 250 (Emphasis added)



more broadly written—it was to include "all complaints, disputes, or grievances arising between [the parties]" —and clearly indicated that either labor or management could process a grievance.[2] The standard of analysis used by the Court apparently fixes on two factors: (1) Whether the grievance and arbitration provisions were wholly employee

[2]Unlike the language in Atkinson, the grievance procedure in Drake Bakeries unequivocally was designed to allow either the employee or the employer to initiate grievance procedures:

> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.
>
> In the *adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management.* It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the *issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party.* The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, *then either party shall have the right to refer the matter to arbitration as herein provided.*

*Quoted in* Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 257 n.2. (Emphasis added)

and union initiated or could be initiated by either the employees or the employer, and (2) Whether disputes over the violation of no-strike clauses were intended by the parties to be subject to grievance and arbitration procedures.

Each of the cases that has ruled that a violation of a no-strike clause is not subject to arbitration has done so when the grievance and arbitration provisions were wholly employee and union initiated.[3] Burton Construction contends that Article XIII is wholly employee initiated, citing the following language:

> In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative[.]

We find this language ambiguous as to whether an employer can initiate a grievance, but in the context of the sentence immediately following the quoted language, it becomes apparent that the parties intended that either party could process a grievance:

> If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and *the aggrieved party* shall notify *the other party* the dispute is being referred to a Board of Adjustment.

(Emphasis added.) Reference to the parties as "the aggrieved party" and "the other party" is, as was the case in Drake

[3]See, e.g., Friedrich v. Local 780, IUE, 5 Cir., 515 $F_2$ 255; Faultless Division v. Local 2040, I.M. & A.W., 7 Cir., 513 $F_2$ 987, 990; Affiliated Food Distributors, Inc. v. Local 229, Teamsters, 3 Cir., 483 $F_2$ 418, cert. denied, 415 U.S. 916; Firestone Tire & Rubber Co. v. Rubber Workers Union, 5 Cir., 476 $F_2$ 603, 605-606; G. T. Schjeldahl Co. v. Local 1680, Machinists, 1 Cir., 393 $F_2$ 502; Boeing Co. v. UAW Local 1069, 3 Cir., 370 $F_2$ 969.



Bakeries, indicative that under the agreement either party could initiate the grievance procedure.

The second prong of the Atkinson-Drake Bakeries analysis is one of contractual interpretation—whether the language of Article XIII is broad enough to include alleged violations of the no-strike clause. Article XIII provisions were intended to cover any "dispute . . . involving the application or interpretation of the terms of th[e] agreement." This language is much more analogous to the language in Drake Bakeries, which the Court determined was broad enough to cover a violation of a no-strike clause, than to the corresponding provision in Atkinson.[4] The similarity between Article XIII and the language in Drake Bakeries together with the Warrior & Gulf presumption of arbitrability—that disputes should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" —convinces us that the district court correctly concluded that under this collective bargaining agreement, the alleged violation of the no-strike clause was an arbitrable issue.

II.

In its trial memorandum, Burton Construction raised the issue of whether the unions were estopped from claiming any right of arbitration on the basis of certain equitable principles (e.g., repudiation, laches, waiver) because of their dilatory pleading practices before the district court. Before confronting this issue, however, the district court had to determine whether judicial proceedings or arbitration was the proper forum for determining the merits of the equitable defenses raised by Burton Construction. Reluctantly, the district court answered that equitable defenses should also be decided by

[4]The parties in Drake Bakeries had agreed to attempt adjustment of "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by" the agreement, whereas in Atkinson, the grievance procedure only applied to "any difference regarding wages, hours or working conditions. . ."

arbitration as mandated by Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. We cannot agree with the district court's conclusion that in every instance where the parties of a section 301 action are bound by a collective bargaining agreement Flair Builders requires questions of waiver, repudiation, estoppel, laches or other equitable defenses to be determined by an arbitrator. We deem this broad conclusion to be subject to an important limitation.

The issue in Flair Builders was whether a party to a collective bargaining agreement may be so dilatory in making the existence of a "vaguely delineated dispute" known to the other party that a court is justified in refusing to compel the submission of an otherwise arbitrable issue to an arbitrator. The Supreme Court did not directly answer this question, but instead ruled that the arbitration clause in that case was so broadly worded as to include also the arbitration of the laches issue. The Court, noting that its decision did not excuse a judicial examination of the scope of an arbitration clause as to whether equitable defenses should be decided by the arbitrator or the court, concluded that

> once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.

Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92. Thus, Flair Builders did not determine that every equitable defense was an arbitrable issue, but that its arbitrability hinged upon the scope of the arbitration clause.

The equitable defense in the instant case arose from alleged "evasive" and "dilatory" pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we



assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court. To hold otherwise would unnecessarily hamper a court's control of its proceedings.

We do not read Flair Builders nor its progeny as requiring a district court to flatly forego the exercise of its traditional powers in favor of arbitration in determining the merits of alleged equitable defenses. After analyzing and reviewing Flair Builders and the subsequent cases citing it, we conclude that Flair Builders can be confined to the proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a grievance,[5] be they intrinsic procedural questions or extrinsic questions as defined by John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543.[6] This is not an unduly narrow reading of Flair Builders. Surely, no one would contend that an express waiver of a party's right to demand arbitration

[5]See, e.g., H & M Cake Box, Inc. v. Bakery Workers Local 45, 1 Cir., 493 $F_2$ 1226, cert. denied, 419 U.S. 839; General Dynamics Corp. v. Local 5, Marine and Shipbuilding Workers, 1 Cir., 469 $F_2$ 848; Operating Engineers Local 139 v. Carl A. Morse, Inc., E.D. Wis., 387 F. Supp. 153; Local 552, Brick and Clay Workers v. Hydraulic Press Brick Co., S.D. Mo., 371 F. Supp. 818. But see Ladies' Garment Workers' Union v. Ashland Industries, Inc., 5 Cir., 488 $F_2$ 641, cert denied, 419 U.S. 840.

[6]Two cases citing Flair Builders, however, have called for the arbitration of equitable defenses not arising out of the processing of a grievance or the formation of a collective bargaining agreement. Controlled Sanitation Corp. v. District 28, I.M. & A.W., 3 Cir., 524 $F_2$ 1324, cert. denied, 44 U.S.L.W. 3471; Local 542, Operating Engineers v. Penn State Construction, Inc., M.D. Pa., 356 F. Supp. 512. In each of these section 301 actions, the defendants alleged arbitrability of the underlying dispute. Because of certain pleading delays on the part of the defendants, the plaintiffs in each case countered the arbitrability claim, asserting that the defendants had waived or repudiated their right to arbitrate the dispute. As was the case with the district court in this instance, the courts held that Flair Builders mandated the arbitration of the waiver and repudiation defenses, but neither court focused on what we have determined to be a crucial distinction—a court's inherent and unrestricted power to control the judicial functions.

during the course of a case in district court would not be adequate legal grounds for the district court to proceed to the merits of an otherwise arbitrable dispute without requiring arbitration.

The test employed by the Supreme Court in Flair Builders to determine the arbitrability of the laches issue was whether the parties had, by the language of the collective bargaining agreement, intended that such a dispute be arbitrable. Following this test, we must determine whether Burton Construction and the unions agreed to arbitrate any questions of equitable defenses arising out of misconduct in court cases in which the two were parties. As discussed earlier, the language of Article XIII was broad enough to include disputes dealing with violations of the no-strike provision and would probably cover the type of laches defense raised in Flair Builders, but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function.

Allowing federal courts to retain jurisdiction under section 301 of the National Labor Relations Act of an otherwise arbitrable dispute because of certain misconduct of one of the parties in the judicial proceedings themselves which gives rise to some type of estoppel to claim arbitrability is not inconsistent with the strong national labor policy favoring arbitration of labor disputes. As noted earlier, this policy is partly premised on the understanding that

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.



United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83. If it can be concluded with "positive assurance" that the parties did not intend to arbitrate certain disputes, the policy favoring arbitration does not come into play. As discussed above, the parties in this case neither intended nor had the power to require arbitration of certain equitable defenses that have traditionally been decided exclusively by the courts.

In conclusion, therefore, we hold that the trial court erred in ruling that it was "bound" by Flair Builders to submit to arbitration the question of whether the unions should be prevented from demanding arbitration because of "evasive" and "dilatory" pleading practices before the court. It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute—the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by Flair Builders to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

Remanded.

# APPENDIX C

## SELECTED PLEADINGS[1]

### 1. Respondent Burton's Complaint for Damages and Injunction (July 13, 1973)

COMES NOW the Plaintiff, Reid Burton Construction, Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

1. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado, with principle office and place of business at Fort Collins, Colorado.

2. Defendants, and each of them, are labor organizations within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. Defendant Local 1340 has its principle office at Fort Collins, Colorado, Defendant Carpenters District Council of Southern Colorado has its principle office at Colorado Springs, Colorado, and Defendant Colorado Building and Construction Trades Council has its principle office at Denver, Colorado.

3. Defendants, and each of them, represent employees in an industry affecting commerce and Plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, 29 U.S.C. §152.

4. Jurisdiction over this action is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International

[1] Relevant pleadings, or portions thereof, are included in Appendix C. Respondent has deleted party captions, signatures, signature pages and certificates of service. The pleading was filed in the United States District Court for the District of Colorado on the date following the caption of the pleading.



Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado that they and their members will not strike or picket the Plaintiff during the term of the agreement. Said collective bargaining agreement further defines the relationship of the Plaintiff to Plaintiff's contractors or subcontractors on construction sites in so far as all the requirements, conditions and intents of the said collective bargaining agreement applies to said contractors or subcontractors of Plaintiff.

7. Defendant, Colorado Building and Construction Trades Council, is an unincorporated association and an amalgamation of numerous labor organizations in the building and construction industry in the State of Colorado, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions.

8. On or about February 25, 1973, a representative of Defendant Colorado Building and Construction Trades Council, submitted to Plaintiff herein for its requested signature a labor agreement which would require, inter alia, that Plaintiff contract only with union subcontractors in the future on all its construction sites, which union subcontractors must have signed union agreements with the various construction trades, including subcontractors performing carpenter work.

9. When Plaintiff refused to sign the labor agreement described above in paragraph eight, Defendant Colorado

Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on or about March 8, 1973 and continued to do so until on or about March 16, 1973. On or about April 3, 1973, and continuing to on or about April 13, 1973, such picketing was resumed by Defendant Colorado Building and Construction Trades Council where the object thereof was to force Plaintiff to sign the submitted labor agreement.

10. The picketing described above in paragraph nine was implicitly and/or expressly authorized by and/or ratified by the constituent labor organizations which are members of the Colorado Building and Construction Trades Council, including Defendants Local 1340 and Defendant Carpenters District Council of Southern Colorado, and at all times Defendant Colorado Building and Construction Trades Council was acting within the scope of its authority from its members.

11. During the period of the picketing described above in paragraph nine, Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, by its representatives, induced, encouraged or coerced its employee members to cease performing work for Plaintiff on the subject construction site and otherwise endorsed, enforced and supported the picket of Defendant Colorado Building and Construction Trades Council.

12. The picketing of Defendant Colorado Building and Construction Trades Council, as described above in paragraph nine, resulted in Plaintiff's construction site being temporarily shut down in whole or in part during the period of said picketing, thus subjecting Plaintiff to monetary losses in the approximate amount of $1,000.00 per day, which amount cannot be definitely ascertained at this time, but will be at the time of trial of this cause.

13. The labor agreement submitted for signature by Defendant Colorado Building and Construction Trades Council, as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, among others, would require Plaintiff to conduct his business at its construction sites relative to labor relations in a manner that



is not required under its existing agreement with Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. By the action of the Defendant Colorado Building and Construction Trades Council as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, the two aforementioned Carpenter Defendants are attempting to change the provisions of their existing collective bargaining agreement and thus have violated the terms of that agreement and have caused Plaintiff damages in their attempt to make such change.

14. The action of Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado in endorsing and supporting the picket line established by its agent, Defendant Colorado Building and Construction Trades Council, and the action of the two Carpenter Defendants aforementioned in inducing and encouraging and/or coercing its members to refuse to work for Plaintiff, also constitutes a breach of their contract promises not to strike or picket Plaintiff during the term of their collective bargaining agreement. By such action, the two Carpenter Defendants further contributed to the damages suffered by Plaintiff as described above.

15. Defendant Colorado Building and Construction Trades Council, by its representatives, continues to request Plaintiff to sign its labor agreement as described above, and continues to threaten to picket Plaintiff as done previously where the object thereof is to force Plaintiff to sign said agreement and it can be reasonably anticipated that unless enjoined, Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, will continue to do so.

WHEREFORE, Plaintiff prays this Honorable Court to enter judgment in favor of Plaintiff against all Defendants jointly and severally, in the approximate amount of $16,000.00 to compensate Plaintiff for its monetary losses during said picketing, such amount to be more definitely ascertained at the time of the trial of this action. The Court is further requested to enter an order forever restraining Defendant Colorado Building and Construction Trades Council, as

agent for the two Carpenter Defendants herein, from picketing Plaintiff where the object thereof is to force or require Plaintiff to sign the aforementioned labor agreement; the Court is further requested to restrain Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado from authorizing the Defendant Building Trades Council to picket Plaintiff or to solicit Plaintiff's signature on the subject labor agreement, and from supporting and endorsing the picket line of Defendant Building Trades Council and from inducing, encouraging and/or coercing their members to respect the picket line of said Building Trades Council.

FURTHER, this Court is urged to award Plaintiff reasonable attorney's fees, costs, interest, and such other and further relief as this Court may deem proper.

2. **Excerpts from Respondent Burton's Amended Complaint (September 14, 1973)**

COMES NOW the Plaintiff, Reid Burton Construction Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

* * * * * *

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

3. **Excerpts from Petitioners' Answer and Counterclaim (November 9, 1973)**

ANSWER

COMES NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of International Brotherhood of Carpenters and Joiners of America, by their



attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

* * * * *

COUNTERCLAIM

1. Defendant Carpenters District Council of Southern Colorado is a labor organization within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et. seq., is an unincorporated association, and has its principal office in Colorado Springs, Colorado.

2. Defendant Carpenters District Council of Southern Colorado represents employees in an industry effecting commerce and plaintiff is an employer in an industry effecting commerce, as that term is defined in the National Labor Relations Act, as amended, 29 U.S.C. §152.

3. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado with principal office and place of business at Fort Collins, Colorado.

4. Jurisdiction over this Counterclaim is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction

1972-75 Agreement" effective May 1, 1972 to, through, and including April 30, 1975.

6. Said collective bargaining agreement provides in Article XIII entitled "Contractural [sic] Disputes" a mandatory dispute settlement procedure culminating in a Board of Adjustment hearing and the selection of an impartial chairman. Said Board of Adjustment has final and binding authority to resolve disputes involving the application or interpretation of the terms of said agreement.

7. A dispute involving the application or interpretation of the above mentioned agreement within the meaning of Article XIII, Section 1 of said agreement has arisen between the plaintiff and defendant Carpenters District Council of Southern Colorado in that plaintiff alleges in its Amended Complaint that said defendant has violated Article XIII, Section 5 pertaining to strikes, work stoppages, etc. and Article IV pertaining to subcontracts.

8. In accordance with Article XIII of the above mentioned collective bargaining agreement, plaintiff has a mandatory obligation at the time the above described dispute arose to utilize the dispute settlement procedures provided for in said article, and the plaintiff's failure to abide by the terms of said article constitutes an express violation of said collective bargaining agreement, thereby giving rise to the express right in the defendant Carpenters District Council of Southern Colorado to take appropriate economic action against the plaintiff.

9. By commencing the within lawsuit against defendants Carpenters District Council of Southern Colorado and Local 1340 for breach of their contractual promises not to strike and for violating their agreement by attempting to change the provisions of Article IV entitled "Sub-contractors" of the above mentioned collective bargaining agreement, the plaintiff has flagrantly disregarded its mandatory obligation to abide by the contractual dispute settlement procedures set forth in said collective bargaining agreement, and the plaintiff violated the express terms of Article XIII of said collective bargaining agreement.



10. As a proximate result of plaintiff's above described breach of the above mentioned collective bargaining agreement, the defendant has suffered damages including, inter alia, the cost of defending the within lawsuit.

WHEREFORE, defendant Carpenters District Council of Southern Colorado prays that this Honorable Court grant the following relief:

1. That judgment be entered in favor of the defendant Carpenters District Council of Southern Colorado against the plaintiff and that the defendant be awarded all costs incurred, including reasonable attorney's fees, in defending the within lawsuit.

2. That the Court award defendant such other and further relief as this Court may deem proper.

**4. Excerpts from Petitioners' Amended Answer and Counterclaim (March 11, 1974)**

COME NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Amended Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

**5. Excerpts from Petitioners' Pre-Trial Statement (March 11, 1974)**

* * * * *

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

b. Defendants' Claim

The Plaintiff contends that the Defendant Carpenters' unions have a labor agreement with the Plaintiff which contains a promise not to strike or picket the Plaintiff and that said promise was violated by the picketing of the Colorado Building Construction Trades Council in March and April, 1973 because the Trades Council was acting as the agent of the Carpenter Defendants at this time. In addition, the Plaintiff also contends that the Carpenter Defendants coerced their members into not working for Plaintiff during this same period and thereby directly violated the no-strike promises contained in the collective bargaining agreement with the Plaintiff.

The Defendant Carpenter unions deny Plaintiff's allegations of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972-75 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction Trades Council and, therefore, has no agency relationship to the Trades Council. On the other hand,



Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

* * * * *

(B) UNCONTROVERTED FACTS

The Defendants above-named contend that the following facts are uncontroverted:

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement known as "Carpenters' Building Construction 1972-75 Agreement."

* * * * *

5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement.

**6. Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 18, 1974)**

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, and move this Honorable Court to Dismiss the above-captioned Action on the grounds that the Court lacks jurisdiction over the subject matter because the Pleadings and the Depositions on file show on their face that the controversy described therein is one within the exclusive jurisdiction of an arbitrator selected and acting pursuant to the provisions of Article XIII of the collective bargaining agreement upon which this Action is based.

## 7. Excerpts from Petitioner's Brief in Support of Suggestion to Dismiss Pursuant to Rule 12(h) (3) (July 18, 1974)

### PRELIMINARY STATEMENT

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by and through its attorneys, the LAW OFFICES OF JOHN W. McKENDREE, and suggest pursuant to Rule 12(h)(3) of the Fed.R.Civ.P. that this Court is without jurisdiction over the subject matter of the within controversy and hence should Order dismissal of the Action. Bank v. U.S., 16 F.R.D. 310, 312-313 (S.D. Calif. 1954). See also Arcaya v. Estrada, 24 F.R.Serv. 12 h.234, Case 1 (S.D.N.Y. 1957).

### ARGUMENT

THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE INSTANT DISPUTE BECAUSE: (1) THE DISPUTE IS SUBSTANTIVELY ARBITRABLE; (2) THE FINAL AND BINDING ARBITRATION PROCEDURES PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT ARE AVAILABLE TO THE PLAINTIFF: and (3) THE PLAINTIFF FAILED TO UTILIZE SUCH PROCEDURES BEFORE INSTITUTION OF THE PRESENT ACTION.

* * * * *

Although heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. Consolidation Coal Co. v. United Mine Workers, Local 5869, 362 F.Supp. 1073 (S.D.W.Va. 1973). As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.